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8 **IN THE UNITED STATES BANKRUPTCY COURT**  
9 **FOR THE DISTRICT OF ARIZONA**

10 In re:

11 **KELLY JAMES McINROY,**  
12 **Debtor.**

13 Address: 5328 N. 42<sup>nd</sup> Pl.  
14 Phoenix, AZ 85018

15 Soc.Sec.No.: xxx-xx-9340

Chapter 11 Proceedings

Case No. 2:10-bk-21290-GBN


**MOTION FOR AUTHORIZATION TO USE  
CASH COLLATERAL**

16 Kelly James McInroy, debtor and debtor-in-possession herein (the “Debtor”), by and through  
17 his attorneys Aiken Schenk Hawkins & Ricciardi P.C., requests this Court enter an order pursuant to  
18 Bankruptcy Code section 363 and Rules 4001 and 9014 of the Federal Rules of Bankruptcy  
19 Procedure authorizing the use of cash collateral on an interim and final basis. This Motion is  
20 supported by the attached Memorandum of Points and Authorities.

21 DATED this \_\_\_\_ day of August, 2010.

22 AIKEN SCHENK HAWKINS & RICCIARDI P.C.

23 By \_\_\_\_\_

24   
25 D. Lamar Hawkins  
26 Christopher R. Chicoine  
27 4742 North 24<sup>th</sup> Street, Suite 100  
28 Phoenix, Arizona 85016-4859  
Attorneys for Debtors

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. JURISDICTION AND VENUE**

3 1. This Court has jurisdiction over this Motion under 28 U.S.C. §§ 157 and 1344.

4 2. This matter constitutes a core proceeding within the meaning of 28 U.S.C. §  
5 157(b)(2)(A) and (M).

6 3. Venue of this proceeding and the Motion is proper in the District of Arizona pursuant  
7 to 28 U.S.C. §§ 1408 and 1409.  
8

9 **II. RULE 9014(b)(1)(B) STATEMENT**

10 4. Kelly James McInroy (the “Debtor”), filed a voluntary petition under Chapter 11 of  
11 the Bankruptcy Code on July 8, 2010 (the “Petition Date”).

12 5. The Debtor is managing his assets as debtor-in-possession in accordance with 11  
13 U.S.C. §§ 1107 and 1108.

14 6. The Debtor is a single man residing in Maricopa County, Arizona. The Debtor is a  
15 fire engineer/paramedic with the City of Glendale. As of the Petition Date, the Debtor had interests  
16 in the following residential income properties:  
17

18 a. 29585 North 68<sup>th</sup> Dr., Peoria, Maricopa County, Arizona 85383 (the “68<sup>th</sup>  
19 Drive Property”).

20 b. 6605 North 93<sup>rd</sup> Ave., Unit 1056, Glendale, Maricopa County, Arizona 85305  
21 (the “93<sup>rd</sup> Avenue Property”).  
22

23 7. These properties comprise the majority of the assets of the bankruptcy estate.

24 8. The Debtor requests court approval to retain the rents generated from the 68<sup>th</sup> Drive  
25 Property and the 93<sup>rd</sup> Avenue Property (together, the “Rental Properties”) in order to fund their  
26 operating expenses.

27 9. The Debtor will allocate the cash derived from the Rental Properties pursuant to  
28 itemized net profit/loss statements (the “Operating Budgets”). True and correct copies of the

1 Operating Budgets are attached hereto as Exhibit A. The Operating Budgets clearly show that every  
2 dollar of rent will be spent on necessary operating expenses and/or debt servicing. The Debtor will  
3 use the rents to pay all operating expenses first and thereafter hold the balance in the debtor-in-  
4 possession account until the Debtor can resolve the treatment of the secured creditors by stipulation  
5 or other court order.

6  
7 10. Bank of America and PNC Mortgage (collectively the "Banks") may claim a security  
8 interest in the Rental Properties, as well as an "interest" in cash collateral pursuant to §363.<sup>1</sup> The  
9 Debtor believes that PNC Mortgage holds a first position claim on the 68<sup>th</sup> Drive Property and that  
10 Bank of America holds first and second position claims on the 93<sup>rd</sup> Avenue Property.

11 11. The Debtor's proposed use of cash collateral will provide for the cash collateral to be  
12 reinvested in Rental Properties to stabilize and/or enhance of the value of the sale.

13  
14 12. The Banks are adequately protected by Debtor's proposed use of the cash collateral.

### 15 **III. POINTS AND AUTHORITIES**

16 Section 363 of the Bankruptcy Code permits the use of cash collateral upon an interested  
17 party's consent or a finding of adequate protection after notice and a hearing. 11 U.S.C. §§ 363(c)  
18 and (e). Section 361 fails to give a definition of "adequate protection", nonetheless, bankruptcy  
19 courts have offered substantial guidance regarding the meaning of such phrase.

#### 20 **A. Debtors' Proposed Use of Cash Collateral For Utilities, Maintenance and** 21 **Repairs Will Adequately Protect the Banks.**

22 A large number of bankruptcy courts have found adequate protection where cash collateral is  
23 used to maintain and preserve the property subject to an objecting creditor's lien. See Principal  
24 Mutual Life Insurance Co. v. Atrium Development Co. (In re Atrium) 159 B.R. 464, 471 (Bankr.  
25 E.D. Va. 1993) ("Adequate Protection is typically established by the fact that the cash is being used  
26

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27 <sup>1</sup> The Debtor has yet to determine the validity, priority, enforceability and/or extent of the claimed liens and, therefore,  
28 the Debtor takes no position regarding the same, but all claimed liens are valid for the sole purposes of this Motion. Secured Creditors have the burden of proof to establish validity of their purported "interests" in cash collateral under §363(p)(2).

1 to maintain and enhance the value of the underlying income producing real property in which the  
2 creditor also usually holds a security interest”); see also In re 499 W Warren Street Associates, Ltd.  
3 Partnership, 142 B.R. 53, 56 (Bankr. N.D.N.Y. 1992) (citing Hartigan v. Pine Lake Village  
4 Apartment Co. (In re Pine Lake Village Apartment Co.) 16 B.R. 750, 756 (Bankr. S.D.N.Y. 1982);  
5 see also In re Princeton Square Assocs., 201 B.R. 90-96 (Bankr. S.D.N.Y. 1996) (“[T]his court  
6 concludes that no monetary protection is required to be provided by the debtor in possession to the  
7 secured creditor to the extent that the rents are applied for the maintenance of the property in the  
8 manner a receiver would apply the rents.”). Another bankruptcy court noted:

10 “the application of rent income solely to maintain and repair the property as to  
11 prevent further deterioration will enhance the value of the property which serves  
12 as the collateral for plaintiff-mortgagee’s interest. The protection and maintenance  
13 of plaintiff-mortgagee’s collateral, without diversion of funds to the debtor,  
clearly ensures that the plaintiff-mortgagee’s investment is adequately protected.”  
In re Pine Lake Village Apartment Co. 16 B.R. at 756

14 In re McCombs, 88 B.R. 261 (C.D. Cal. 1988) similarly concluded:

15 “Use of the cash collateral for needed repairs and renovations should actually  
16 result in increased rentals. Debtor has committed to use the cash collateral to pay  
17 operating expenses and improve and maintain the Property with any excess  
18 income going to First Texas. By dedicating cash collateral for these purposes,  
debtor has substantially eliminated the risk of diminution of First Texas' interest  
in cash collateral.”

19 Here, the Banks are adequately protected by the Debtor’s proposed use of the rent proceeds.  
20 The rents will be used to fund payments for operating expenses such as utilities, maintenance and  
21 recurring repairs. As the above case law suggests, the Debtor’s proposed use of the rents alone  
22 should suffice as adequate protection for the Banks.  
23

24 **B. The Banks Are Adequately Protected by Stable Asset Values.**

25 “Adequate protection is provided to safeguard the creditor against depreciation in the value  
26 of its collateral during the reorganization process.” First Federal Bank of California v. Weinstein (In  
27 re Weinstein) 227 B.R. 284, 296 (9th Cir. BAP 1998)(citing Paccomm Leasing Corp. v. Deico Elecs.,  
28 Inc. (In re Deico Elecs., Inc.), 139 B.R. 945, 947 (9th Cir. BAP 1992)). Accordingly, adequate

1 protection should be found where the values of assets securing the collateral are stable. See In re  
2 Mullen, 172 B.R. 473, 477 (Bankr. D. Mass. 1994)(“Most courts hold no adequate protection  
3 payments was necessary when the property’s value remains constant.”)(citing In re IPC Atlanta  
4 Limited Parntership, 142 B.R. 547 (Bankr. N.D. Ga. 1992)); see also Chase Manhattan Bank USA,  
5 N.A. (In re Stembridge) 394 F.3d 383, 387 (5th Cir. 2004)(adequate protection measured by decline  
6 in value of collateral); see also In re Beker Industries Corp., 58 B.R. 725, 736 (Bankr.  
7 S.D.N.Y.1986)(adequate protection “focus is protection of the secured creditor from diminution in  
8 the value of its collateral during the reorganization process.”).

10 Furthermore, the value of the collateral should be measured by the stream of rent income  
11 and, therefore, steady rent constitutes adequate protection of the collateral. See Mullen, 172 B.R. at  
12 478. Mullen concluded:

14 “The value of the Debtor’s properties is therefore based upon their rental incomes.  
15 As a result, so too is the value of [creditor’s] mortgage interest...***The value of the***  
16 ***mortgage interest is not declining because rents are not declining.*** Consumption  
17 of those rents has no adverse effect upon the mortgage value. Indeed, it has a  
18 positive affect. If the rents were not used to pay for management, taxes and  
19 maintenance of the properties, the value of [creditor’s] mortgage interest would  
20 rapidly decline.” Id. (emphasis added).

18 Here, the Banks are adequately protected by the stability of the value of the collateral  
19 securing their liens since the rent revenues are projected to remain consistent over at least the next  
20 six months. Second, as previously indicated, the Debtor essentially proposes to reinvest the rents  
21 back into the Rental Properties which will stabilize, if not enhance, the value of the collateral. This  
22 Court should grant the Motion on these grounds alone.

24 C. **Adequate Protection Does Not Include The Banks’ Lost Interest or**  
25 **Opportunity Costs.**

26 Under no circumstance does adequate protection include the lost interest or lost opportunity  
27 costs incurred from a secured creditor’s delay in the realization of collateral. United Sav. Ass’n of  
28 Texas v. Timbers of Inwood Forest Associates, Ltd. 484 U.S. 365, 108 S.Ct. 626 (1988)(“interest”

1 entitled to adequate protection does not include the right to immediately foreclose on the collateral  
2 and, therefore, creditor has no right to interest from delay in realizing the collateral.); see also In re  
3 Weinstein 227 B.R. 284, 296 (9th Cir. BAP 1998)(“adequate protection payments cannot be used to  
4 compensate the creditor for lost interest or to provide lost opportunity costs”); see also In re Cantrup  
5 32 B.R. 1004, 1005 (Bankr. D.Colo 1983) (Congress did not intend to include payments to  
6 undersecured creditors for the loss of the use of their money resulting from the automatic stay under  
7 § 362.”); see also Production Credit Assoc’n v. Pullins (In re Pullins) 65 B.R. 560, 563 (Bankr.  
8 S.D.OH 1986) (Undersecured creditor was not entitled to be compensated, in form of “adequate  
9 protection” payments, for money it could earn by foreclosing on its collateral and reinvesting  
10 proceeds). To reiterate, another Ninth Circuit bankruptcy court noted:

11  
12 “there is no entitlement to cash payments, replacement liens, or other methods  
13 of adequate protection to compensate the creditor for lack of access to the  
14 collateral for the period of time foreclosure is forestalled due to the automatic  
15 stay or for loss of the use of the money it would have been able to receive on  
16 liquidation of its collateral, often called “opportunity costs.” In re Sun Valley  
17 Ranches, Inc. 38 B.R. 595, 597 (Bankr.Idaho1984)

18 Here, per Timbers, none of the Banks are entitled to receive adequate protection payments in  
19 the form of reimbursement for lost interest income or opportunity costs from the delay in realizing  
20 any of the Collateral. This should also prove to be a moot issue since, if the Motion is granted, the  
21 Debtor intends to perform under his Plan obligations and, accordingly, there will likely be no such  
22 need for any of the Banks to pursue state law remedies in the Collateral.

### 23 **III. CONCLUSION**

24 The Debtor requests this Court grant his Emergency Motion to Use Cash Collateral. The  
25 Banks are adequately protected under §361 in several ways. First, the values of the collateral  
26 securing Banks’ interests are stable. Rents are steady and will hopefully increase throughout the life  
27 of the Plan. In addition, the Debtor will use the rent proceeds to reinvest in the Rental Properties.  
28 The rents will be used to pay operating expenses, and the balance will be kept in a separate debtor-  
in-possession account until the treatment of the secured creditors’ claims is resolved by stipulation

1 or other court order. This alone would support this Court's finding of adequate protection per  
2 Warren Street, Pine Lake or McCombs.

3 This Court should grant the Motion.


4 WHEREFORE, the Debtor respectfully requests:

5 1. Entry of an order authorizing use of cash collateral in accordance with the Operating  
6 Budgets attached as Exhibit A.

7 2. Granting such other relief as the Court deems just and proper.

8 DATED this \_\_\_\_ day of August, 2010.

9 AIKEN SCHENK HAWKINS & RICCIARDI P.C.

10 By   
11 D. Lamar Hawkins  
12 Christopher R. Chicoine  
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Attorneys for Debtors

15 COPY of the foregoing mailed, or served  
16 via electronic notification\* or fax\*\* or if so marked,  
17 this 17 day of August, 2009, to:

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**Kelly McInroy**  
**Monthly Income Worksheet**

**29585 N. 68<sup>th</sup> Dr.**  
**Peoria, AZ 85383**

<b><u>Gross Rental Income:</u></b>	<b>\$1,400</b>	(estimated)
<b><u>Operating Expenses:</u></b>		
HOA	\$45	
Repairs	\$50	(approximate)
Cleaning	\$40	
Utilities	\$280	
Pool	\$ N/A	
Landscaping	\$75	
<b>Total Operating Expenses:</b>	<b>\$490</b>	
<b><u>Mortgage Expenses:</u></b>		
PNC Mortgage	\$2,394.50	
Taxes & insurance included.		
<b>Total Debt Service:</b>	<b>\$2,3494.50</b>	

**Kelly McInroy**  
**Monthly Income Worksheet**

**6605 N. 93<sup>rd</sup> Avenue Unit 1056**  
**Glendale, AZ 85305**

<b><u>Gross Rental Income:</u></b>	<b>\$1,500</b>	(estimated)
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**Operating Expenses:**

HOA	\$220	
Repairs	\$ 25	(approximate)
Cleaning	\$ 25	
Utilities	\$210	
Pool	\$ N/A	
Landscaping	\$ N/A	
Annual Property Advertisement (\$300/yr ÷ 12)	\$25	
<b>Total Operating Expenses:</b>	<b>\$505</b>	

**Mortgage Expenses:**

Bank of America (1 <sup>st</sup> )	\$1,858.85	
Taxes & insurance included. Bank of America (HELOC)	\$ 200.00	(approximate)
<b>Total Debt Service:</b>	<b>\$2,058.85</b>	